

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

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TERRELL MANUEL, et al.,  
vs.  
WELLS FARGO BANK, NATIONAL  
ASSOCIATION  
-----

:  
:  
: Civil Action No.  
: 3:14CV238  
:  
:  
: March 11, 2015  
:

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Peppy Peterson, RPR  
Official Court Reporter  
United States District Court

P R O C E E D I N G S

THE COURT: Hello. This is Manuel and White against Wells Fargo Bank, National Association, docket number 3:14CV238. Who is here for whom starting with counsel for the plaintiff, and when you speak, please give your name.

MR. BENNETT: This is Leonard Bennett for the plaintiff.

MR. ROBINSON: Your Honor, this is Jimmy Robinson and Clay Rollins for Wells Fargo, the defendant.

THE COURT: I have a motion of the defendant to modify the scheduling order, docket number 34. I don't see in it, or maybe I missed it, whether there is opposition to it.

MR. BENNETT: Your Honor, the plaintiff does not -- as I represented to counsel, we weren't joining in the motion. We would not object to it, and, candidly, it's our intention to file our Rule 23 class certification motion by the existing deadline.

THE COURT: Well, here's the problem I have: It looks to me like the deadline is March 16th for the filing of summary judgment motions, and, yet, the plaintiffs have noticed some depositions on March 16th, 30(b)(6), on a broad range of topics. Why are you so late filing your

1 discovery -- what is the discovery cutoff, Mr. Bennett?

2 MR. BENNETT: There isn't a discovery cutoff.

3 THE COURT: How did an order get entered here  
4 without a discovery cutoff?

5 MR. BENNETT: Because there are practical cutoffs  
6 of the filings of these two motions. With respect to your  
7 first question, Your Honor, we weren't -- we weren't late  
8 in doing that. We served discovery in 2014, originally  
9 deposition notices for late December before Christmas,  
10 literally before Christmas, and --

11 THE COURT: Why weren't they taken in January and  
12 February?

13 MR. BENNETT: Multiple reasons, and one of the  
14 reasons is, from the plaintiff's side, because we have had  
15 a challenge obtaining, at least from our perspective,  
16 discovery compliance from Wells Fargo.

17 THE COURT: You haven't brought any motions. You  
18 haven't brought a single motion to complain about it.

19 MR. BENNETT: We have not, Your Honor. We  
20 previously had scheduled a call with Your Honor to address  
21 this because your procedure requires us first to have an  
22 informal conference with the Court.

23 THE COURT: And you haven't done that.

24 MR. BENNETT: And we called that off. Since that  
25 time, we have worked to negotiate a detailed specific set

1 of stipulations on the remaining class discovery issues.  
2 We, I think -- it would be accurate to state that counsel  
3 have reached agreement on the stipulations, but we're  
4 waiting for actual approval of the defendant, and we're  
5 working on that certainly as recently as yesterday and  
6 last night and talking about them again today.

7 I'm trying not in this context to throw Mr.  
8 Robinson under the bus, but our position certainly is we  
9 have not received the, what had been promised and  
10 committed. I understand that he is attempting to remedy  
11 that.

12 THE COURT: When is it going to get remedied?

13 MR. BENNETT: The Rule 30(b)(6) deposition, we've  
14 just now agreed to a date that is acceptable to counsel.

15 THE COURT: I didn't ask that question. I said  
16 when is this going to get remedied. Here's the problem I  
17 have, Mr. Bennett. Every case that you have, there are  
18 more motions to extend time than almost any other pleading  
19 at all, and we lose track of what happens in these cases.  
20 So we're not going to -- I'm just not going to have it  
21 anymore.

22 You are going to have to do things the way  
23 everybody else does. You all have a reasonable time to  
24 negotiate and sort out your disputes with each other. If  
25 you can't solve them, bring them here, because what

1 happens inevitably is we get a huge mishmash of nonsense  
2 on the eve of somebody wanting to extend a deadline, just  
3 like we've got in this case, and I don't know how it is  
4 that an order got entered here without a discovery cutoff,  
5 but is there a scheduling order entered in the case?

6 MR. BENNETT: There is, Your Honor. We're not  
7 asking to move our dates. The plaintiff is not asking to  
8 move any of our dates.

9 THE COURT: Well, what you are asking to do is --  
10 I'm being told is you are negotiating, quote negotiating a  
11 resolution of -- trying to get summary judgment decided  
12 before class discovery is over. Now, I don't know what  
13 that's all about or why that's happening either, but  
14 there's a lot packed into this little motion, a lot of  
15 little tidbits that brought this to my attention that I  
16 thought it necessary to focus a little case management  
17 perspective on what's happening in the case. The summary  
18 judgment is March 16th now. Is that where it is?

19 MR. ROBINSON: Yes, Your Honor.

20 THE COURT: Why can't you get your summary  
21 judgment filed on March 16th?

22 MR. ROBINSON: Your Honor, as Mr. Bennett  
23 indicated, we've been challenged with respect to making  
24 sure we can get some discovery completed. We've been  
25 challenged with getting documents. We've been working

1 with the clients to make sure we get those documents.

2 THE COURT: Wait a minute, Mr. Robinson. You are  
3 telling me you've been challenged getting documents from  
4 your client, or are you saying you've been challenged  
5 getting documents from Mr. Bennett's client?

6 MR. ROBINSON: Your Honor, we've been challenged  
7 not in compiling the documents from the financial  
8 institution. Mr. Bennett, we have not been challenged  
9 getting documents from him.

10 We also have been challenged with respect to the  
11 weather. We have had depositions taken, Your Honor. We  
12 went out to Iowa, and we took three depositions that day.  
13 I mean over the course of three days or two days. So we  
14 have done some discovery.

15 Mr. Bennett has been working with us to come up  
16 with a stipulation that would obviate the need for a large  
17 number of these depositions, and we just agreed upon those  
18 stipulations as far as counsel is concerned, and we are  
19 trying to get approval from those stipulations. We've  
20 recommended them to our client, but Your Honor is aware  
21 that we can only, as counsel, make those  
22 recommendations --

23 THE COURT: Tell your client that they have until  
24 the close of business Friday to decide yes or no.

25 MR. ROBINSON: Yes, Your Honor.

1 THE COURT: And I want all the documents that are  
2 agreed to be produced produced by Monday.

3 MR. ROBINSON: Your Honor, you're not talking --  
4 you said documents that have already been agreed to be  
5 produced?

6 THE COURT: But haven't been produced, the ones  
7 you are being challenged by your client. Tell your client  
8 to activate itself over the week and weekend and get  
9 something done.

10 MR. ROBINSON: Your Honor --

11 THE COURT: Are there any disputes as to  
12 documents outstanding at this point in time, things you  
13 haven't agreed to be produced?

14 MR. BENNETT: There are, Your Honor.

15 THE COURT: What are they?

16 MR. BENNETT: The largest divide is the class  
17 member files, class members who applied for a job.  
18 There's a report that was issued about them. There was an  
19 email that was sent to the putative class member telling  
20 them they wouldn't get the job, and then there were notice  
21 letters that the defendant and its agent, First Advantage,  
22 sent to the putative class members.

23 THE COURT: Why aren't those produced, Mr.  
24 Robinson?

25 MR. ROBINSON: We did, in fact, produce those

1 documents for the named plaintiffs, Your Honor. We are --  
2 the class documents are contingent upon the stipulations.  
3 We have an agreement with counsel that we would negotiate  
4 a stipulation that would obviate the need to produce those  
5 documents.

6 So we haven't begun to compile those, and we have  
7 now begun, in earnest, those discussions about  
8 stipulations, and we are working on them, and as we've  
9 indicated to Your Honor, we've made the recommendation on  
10 those stipulations that our client is currently reviewing.

11 I've indicated to Mr. Bennett that our client is  
12 out of the office today, Your Honor, and she's out with  
13 her child, and we have an out-of-office -- something that  
14 we couldn't control, and so we are in a position that we  
15 have to wait at this point in time --

16 THE COURT: When did you get this information to  
17 your client?

18 MR. ROBINSON: We've been working on this  
19 stipulation, Your Honor, for --

20 THE COURT: Mr. Robinson, when did it get in her  
21 hands?

22 MR. ROBINSON: We've been working on the  
23 stipulation for weeks, Your Honor.

24 THE COURT: I didn't ask you that. I asked you  
25 when it got in the hands of the lawyer you are telling me



1 is out.

2 MR. ROBINSON: Yesterday, Your Honor. We got the  
3 finalized stipulation that counsel and I went back and  
4 forth on yesterday evening, Your Honor.

5 THE COURT: Then it's not reasonable to expect  
6 her to have it by close of business on Friday. She shall  
7 agree to it or not by close of business on Monday. She  
8 can work at home. She can read at home unless -- is there  
9 some critical illness that's being attended to?

10 MR. ROBINSON: I do not know, Your Honor.

11 THE COURT: That's the kind of thing you need to  
12 find out. You all are in a four-corners game, and you're  
13 not going to be playing that anymore; all right?

14 MR. ROBINSON: Yes, Your Honor.

15 THE COURT: Now, what else -- as I understand it,  
16 if the stipulation is agreed to, there's no need to have  
17 the class members' files; is that correct, Mr. Bennett?

18 MR. BENNETT: That's correct, Judge.

19 THE COURT: All right. So we'll know that on  
20 Monday, by Monday afternoon. What is the next discovery  
21 problem?

22 MR. BENNETT: Judge, there are the communications  
23 between Wells Fargo and First Advantage regarding the  
24 establishment and maintenance of this procedure by which  
25 First Advantage was delegated to generate and send these

1 notice letters.

2 THE COURT: Who is First Advantage?

3 MR. BENNETT: First Advantage is the consumer  
4 reporting agency or the background screening company that  
5 Wells Fargo has hired to process and handle the actual  
6 authorization forms.

7 THE COURT: All right, I understand.

8 MR. BENNETT: As well as for the generation of  
9 the background check and the sending of the  
10 pre-adverse-action notice letters.

11 THE COURT: Why haven't those documents been  
12 produced, Mr. Robinson, and when will they be?

13 MR. ROBINSON: Your Honor, I think I'm  
14 misunderstanding a little bit. A large portion of those  
15 documents, my understanding, were going to be compiled or  
16 contained within the stipulation.

17 With respect to some of the communications  
18 between First Advantage and Wells Fargo, we've provided  
19 communications, Your Honor, including we provided a copy  
20 of the agreement between the two parties. We've also  
21 provided --

22 THE COURT: Excuse me just a minute. Obviously  
23 he's not talking about documents that you have provided.  
24 Mr. Bennett, what documents of this ilk has he not  
25 provided? It's irrelevant -- obviously if he's provided

1 the documents, you can't be complaining about their  
2 production, so what's the problem?

3 MR. BENNETT: Correct, Judge. He's provided the  
4 contracts, but the actual procedures and protocol for the  
5 process that we're challenging in this case --

6 THE COURT: Hold on. Are those in writing, Mr.  
7 Robinson?

8 MR. ROBINSON: I am not sure, Your Honor, but I  
9 thought that was the stipulation, that we were stipulating  
10 to those procedures and process.

11 MR. BENNETT: That would be true, Your Honor, if  
12 the stipulation is accepted by Wells Fargo.

13 THE COURT: We'll know that by Monday. If you  
14 don't have those stipulations approved that eliminate this  
15 issue by Monday, then by next Friday, the documents need  
16 to be produced.

17 MR. ROBINSON: Yes, Your Honor.

18 THE COURT: And that's the documents in both  
19 categories as to the consumer files and the documents as  
20 to the procedures *inter se* between First Advantage and  
21 Wells Fargo.

22 MR. ROBINSON: With respect to the consumer  
23 files, Your Honor, we are talking about a massive amount  
24 of documents that even if this Court orders that they be  
25 produced by Friday is going to take a heroic effort on all

1 parties' part to even come close to producing a small  
2 percentage of those documents.

3 THE COURT: Mr. Robinson, don't give me heroic  
4 and adjectivial descriptions. Numbers are what count in  
5 making decisions of this sort. What volume of numbers are  
6 you talking about?

7 MR. ROBINSON: I have no idea at this --

8 THE COURT: Then you can't, Mr. Robinson -- Mr.  
9 Robinson, if you have no idea what the number is, you  
10 cannot then represent to the Court that it is a massive  
11 undertaking.

12 MR. ROBINSON: I can represent, Your Honor, that  
13 -- and we've represented this to Mr. Bennett, that we  
14 understand there's at least about 10,000 documents,  
15 8,000-some-odd documents, close to 9,000, I think, that  
16 we're dealing with people, files, files for those class  
17 members.

18 If the stipulation is not agreed to for all of  
19 Wells Fargo, we understand for Mr. Bennett's b(b)(3) claim  
20 there is a potential for 8,900 to close to 10,000  
21 individuals involved. So that would be that many files,  
22 Your Honor.

23 THE COURT: Well, you know the way you deal with  
24 all that is you set up a system to go get them reviewed  
25 and produced, and your client can work it out about how to

1 do them. They have people who can do that kind of thing.  
2 You need to get these things done.

3           Until you show me that it's not possible to do by  
4 Friday of next week, then that's your deadline. If you  
5 can demonstrate with hard evidence that it's not possible  
6 to do by next week and the date upon which it is possible  
7 to do, to accomplish, then -- and why it will take so  
8 long, then we'll reconsider the date. As of now, your  
9 date is next Friday close of business Eastern Standard  
10 Time.

11           MR. ROBINSON: Thank you, Your Honor.

12           THE COURT: Any other documents?

13           MR. BENNETT: No, Your Honor.

14           THE COURT: As of now, I heard nothing that can  
15 suggest to me that you can't file your motion for summary  
16 judgment by March 16th, Mr. Robinson.

17           MR. ROBINSON: Can we make an argument in that  
18 regard, Your Honor?

19           THE COURT: If you'll give me a minute to finish  
20 what I was going to say, you'll probably have that  
21 opportunity. So that failing in your papers other than  
22 this amorphous discussion about what you've been talking  
23 about to no avail, if you'd like to try to make a showing,  
24 I will entertain it now.

25           MR. ROBINSON: Yes, Your Honor. We have been

1 working with Mr. Bennett's office, Your Honor, to come up  
2 with this stipulation, and we have put a concerted amount  
3 of energy and effort into -- and our singular focus has  
4 been to try to come up with these stipulations that can be  
5 agreeable for both parties, Your Honor.

6 THE COURT: What does that have to do with  
7 summary judgment?

8 MR. ROBINSON: Because, Your Honor, our focus has  
9 been on exclusively trying to get the stipulations  
10 together such that we would, in fact, have an agreement  
11 and then have a consent order with the parties to push  
12 back the date which we had discussed with Mr. Bennett's  
13 office so there wouldn't be an objection.

14 In addition to that, Your Honor, if, in fact --

15 THE COURT: Do you have somebody in your office  
16 or are you familiar with the practice in the Eastern  
17 District of Virginia?

18 MR. ROBINSON: We are, Your Honor.

19 THE COURT: You know that that kind of approach  
20 doesn't work here. You have to have teams, I mean people  
21 who are on the negotiating side and people who are on the  
22 litigating side, and you have to go forward on both  
23 fronts, and you know that.

24 MR. ROBINSON: Yes, Your Honor.

25 THE COURT: You haven't done it, though. What

1     you've been doing is you've been negotiating. And that's  
2     not a good excuse.

3             MR. ROBINSON: Yes, Your Honor. We also offer --

4             THE COURT: What is the basis on which you are  
5     proposing to move for summary judgment in the first  
6     instance?

7             MR. ROBINSON: Well, there are two, Your Honor.  
8     One is on the basis of the exemptions to the FCRA  
9     compliant, the 1681a(y) exemption. Your Honor is familiar  
10    with that because Your Honor just ruled on one of those  
11    exemptions in the Thomas case.

12            The second basis, Your Honor, is with respect to  
13    the actual process with the adverse action letter.

14            THE COURT: What does that mean? I don't follow  
15    that.

16            MR. ROBINSON: I'm sorry, Your Honor.

17            THE COURT: I don't follow that. What does that  
18    mean?

19            MR. ROBINSON: The plaintiffs have taken the  
20    position that adverse action in this case occurred once  
21    the employer, Wells Fargo, analyzed the background check  
22    and made a preliminary decision that the applicant or team  
23    member was not eligible for employment at Wells Fargo, and  
24    once they made that initial decision and communicated that  
25    to First Advantage, who then generated the

1 pre-adverse-action notice, that constituted, in the  
2 plaintiff's position, adverse action against the --

3 THE COURT: What did? You mentioned two  
4 different things. One was the preliminary, the decision  
5 by the company internally. The other was the generation  
6 of the adverse action letter by First Advantage. Which  
7 are you talking about?

8 MR. ROBINSON: Well, it's the communication of  
9 that initial analysis to First Advantage that they  
10 leave -- they argue constitutes an adverse action.

11 THE COURT: And you think it should be what?

12 MR. ROBINSON: We believe that it wasn't an  
13 adverse action and that the adverse action was, in fact --  
14 adverse action notice was properly provided to the  
15 plaintiff --

16 THE COURT: No. When do you think the adverse  
17 action occurred, if it did occur?

18 MR. ROBINSON: At termination, Your Honor.

19 THE COURT: So the adverse action is the  
20 termination?

21 MR. ROBINSON: Yes, Your Honor, when they  
22 received the adverse action notice.

23 THE COURT: All right. I understand.

24 MR. ROBINSON: And in this case, with these two  
25 plaintiffs, it was even after that fact because they



1 received adverse action notices after the appeal  
2 process -- I mean before they even concluded their appeal  
3 process.

4 THE COURT: All right, excuse me just a minute.  
5 Nothing that I understand about those two points on which  
6 you propose to move for summary judgment requires any  
7 further factual development of any kind by you. Is that  
8 correct or not correct?

9 MR. ROBINSON: We don't believe that's actually  
10 correct, Your Honor. We believe that there are, you  
11 know -- our 30(b)(6) witness would provide the analysis  
12 that Mr. Bennett said that he was waiting on between Wells  
13 Fargo and First Advantage if we couldn't agree to the  
14 stipulation.

15 THE COURT: Mr. Robinson, that's really not what  
16 I was asking you. I was asking you from your standpoint,  
17 not Mr. Bennett's standpoint, but from your standpoint.  
18 You have at your command all of the information you need  
19 to file summary judgment now on those claims, those  
20 theories that you outlined. You would provide an  
21 affidavit of some sort from your, somebody in your company  
22 about what happened, somebody from First Advantage, and  
23 then the other one, the exemption is just a matter of law,  
24 isn't it?

25 MR. ROBINSON: It is a legal argument, Your

1 Honor.

2 THE COURT: So why -- am I correct that as to the  
3 second ground, you don't need any more discovery of the  
4 other side?

5 MR. ROBINSON: We have not taken, Your Honor, Mr.  
6 White's deposition, the plaintiff, but we would need his  
7 deposition, Your Honor, to provide what his process was.

8 THE COURT: You know what his process was. You  
9 did it.

10 MR. ROBINSON: We do, Your Honor, but that's not  
11 evidence that we are able to provide in a summary judgment  
12 --

13 THE COURT: Of course it is. You can provide an  
14 affidavit of the people who did it. What are you talking  
15 about?

16 MR. ROBINSON: We certainly could, Your Honor.  
17 We could provide that. We've taken Mr. Manuel's  
18 deposition, but we delayed taking Mr. White's deposition  
19 because he's in Phoenix, and we agreed to delay that in  
20 cooperation with plaintiff's counsel because we didn't  
21 want to make him come to Richmond. So we do need his  
22 testimony to also make our argument in the record, Your  
23 Honor.

24 THE COURT: I don't know why, but if you do, get  
25 it. I don't think you have any ground -- basically you

1 have a situation, Mr. Robinson, where it seems to me that  
2 you had plenty of opportunity to develop these arguments  
3 for summary judgment and you haven't done it, and so now  
4 you're up against a deadline.

5 MR. ROBINSON: Your Honor, there's one last --

6 THE COURT: You largely haven't done it because  
7 you think you're going to have stipulations maybe, but the  
8 stipulations don't seem to have anything to do with your  
9 motion for summary judgment.

10 MR. ROBINSON: Your Honor, we do know that if, in  
11 fact, we file our summary judgment motion, Mr. Bennett, as  
12 we indicated in our -- as we indicated in our motion to  
13 Your Honor, would be allowed and would request a 56(b)  
14 motion not to respond.

15 THE COURT: That's fine. That's the way it  
16 works. That's what the rule says. If it's not ready by  
17 the time you're supposed to file summary judgment motions,  
18 then you file a motion and he asks for time. Now, how he  
19 can ask for time in a situation like this to take other  
20 discovery, I don't know, but that's something he has to  
21 show and make a substantial showing on before he's  
22 entitled to get the relief that he asks.

23 It's hard for him to decide exactly whether he's  
24 going to need discovery until he sees what you have to say  
25 in support of your motion, but as to the exemption, do you

1 need any discovery as to the exemption, Mr. Bennett?

2 MR. BENNETT: I do not, Your Honor.

3 THE COURT: What about the other theory that he  
4 was raising, do you need any discovery as to that?

5 MR. BENNETT: If it were just the evidence that  
6 has been disclosed to date, I don't believe we would need  
7 discovery.

8 THE COURT: I just asked him what he was going to  
9 file summary judgment on, and he told us two things.

10 MR. BENNETT: Judge, if it's those legal points,  
11 then, no, we don't need additional discovery.

12 THE COURT: It seems to me you have to file your  
13 motion for summary judgment, Mr. Robinson, and then  
14 decide -- then he can decide whether he needs anything or  
15 not. We'll get this case moving.

16 MR. ROBINSON: Your Honor, if we could just, you  
17 know, ask the Court to give us at least one week. If the  
18 Court isn't willing to push it back one week in order to  
19 give us an opportunity to get the brief drafted, get it  
20 over to our client for review and submission to this Court  
21 as opposed to filing it on the 16th, Your Honor, we would  
22 ask if we would be allowed to file it a week later, the  
23 next Monday.

24 THE COURT: Well, Mr. Robinson, because -- you  
25 must be reading my mind, because I was getting ready to

1 say that under the situation, given where you've been  
2 and -- you have been trying to do some things to move the  
3 case along, you can file it on the 23rd of March by the  
4 close of business Eastern Standard Time.

5 MR. ROBINSON: Thank you, Your Honor.

6 THE COURT: Is there anything else that needs to  
7 be done to get this case moving?

8 MR. BENNETT: No, Your Honor.

9 THE COURT: What have you done about trying to  
10 settle it, gentlemen?

11 MR. BENNETT: I think there is a divide about  
12 whether it can be settled on a class basis, Your Honor,  
13 and we --

14 THE COURT: Have I assigned a magistrate judge to  
15 this?

16 MR. BENNETT: You have. There currently is a  
17 settlement conference set with Judge Novak.

18 THE COURT: All right. I'll let that work itself  
19 out then. You made a demand on them for settlement?

20 MR. BENNETT: We have not made a class demand.  
21 We now will. We have an estimated class size, and we will  
22 make that demand by the close of business tomorrow.

23 THE COURT: Anything else that needs to be done,  
24 gentlemen?

25 MR. BENNETT: No, Your Honor.

1 THE COURT: All right. Let's get about getting  
2 the case ready to go, folks, and I encourage you to  
3 continue your discussions and your efforts, but Ogletree  
4 Deakins is not a small law firm, and there isn't anything  
5 that would keep you from talking and working at the same  
6 time over there, and if the client doesn't want to deal  
7 with that, then that's something you have to work out with  
8 your client. That's the way it's done here. Anything  
9 else? Nothing? Thank you all very much.

10 MR. BENNETT: Thank you, Judge.

11 THE COURT: Bye.

12

13 (End of proceedings.)

14

15

16 I certify that the foregoing is a correct  
17 transcript from the record of proceedings in the  
18 above-entitled matter.

19

20

21 /s/  
22 P. E. Peterson, RPR

\_\_\_\_\_  
Date

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